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TAJ HOSPITAL SDN BHD

v.

KETUA PENGARAH KESIHATAN MALAYSIA & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: S1-21-51-2002]
25 OCTOBER 2007

C ***TORT:*** *Negligence - Duty of care - Director General of Health - Failure to renew licence of private hospital promptly - Whether negligent - Whether plaintiff suffered loss and damages*

D This was the plaintiff's claim for loss and damages arising from the 1st defendant's failure to promptly renew its private hospital licence, in particular its licence for the period 30 September 2000 to 29 September 2001. The plaintiff had submitted the application in question on 1 September 2000 pursuant to reg. 3(4) of the Private Hospitals Regulations 1973. On 8 December 2000, the E District Health Officer, Gombak ('the PKD') inspected the plaintiff's hospital and, having certified that the premises was fit for use as a private hospital, forwarded the application to the State Health Department, Selangor ('the JKN'). On 26 December 2000, the JKN, which was the 1st defendant's State Office, issued a F request to the plaintiff to furnish a fire prevention certificate and copies of the plaintiff's nursing aides' identity cards, which the plaintiff complied on 25 January 2001. The compliance notwithstanding, by letter dated 12 February 2001, the 1st defendant notified the plaintiff that the application could not be G processed because the documents were incomplete, and in the circumstances requested the plaintiff to forward the same documents as submitted by the plaintiff on 25 January 2001. The plaintiff complied and again submitted the two documents on 22 February 2001. Despite the plaintiff's prompt reply, the 1st H defendant, however, took ten months to process the application and did not renew the plaintiff's licence until 6 December 2001. The plaintiff claimed that it was unable to operate the hospital for the relevant period by reason of the 1st defendant's failure to renew the licence on time despite it having fulfilled all the I requirements, and so filed the present negligence suit against the 1st defendant and the Government of Malaysia. The issues that arose were: (i) whether there was a duty of care owed by the

defendants to the plaintiff; if so (ii) whether there was a breach of that duty; and if so (iii) whether the plaintiff had suffered damages in consequence thereof. A

Held (allowing claim; directing registrar to assess damages):

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(1) The duty of care here is with respect to the duty of the 1st defendant to process the plaintiff's renewal of its private hospital licence. The 1st defendant would be failing in its duty of care if it fails to process that application in due course without delay barring any unpreventable impediment that it may encounter. (para 17) C

(2) The plaintiff is an operator of an ongoing licensed private hospital which required its licence to be renewed on a yearly basis. If the licence is not renewed by the 1st defendant promptly the plaintiff could not be in a position to operate its hospital legitimately. A duty of care at common law therefore exists on the part of the 1st defendant to ensure that that licence was issued to the plaintiff in due time. (para 20) D

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(3) The certification by the PKD that the plaintiff's premises was fit for use by as a private hospital notwithstanding, it was still open to the 1st defendant to request the plaintiff to furnish any such information or to comply with further condition deemed necessary for the operation of the hospital provided that the request was made bona fide and without delay. (para 22) F

(4) The 1st defendant had not acted with reasonable promptitude, having only approved the licence more than a year later from the date of application after the expiry of the licence being applied for. Specifically, the 1st defendant is negligent in processing the plaintiff's licence by: (i) requesting the plaintiff to furnish the fire prevention certificate and copies of the nursing aides' identity cards only on 26 December 2000 when he could and should have acted sooner; (ii) acting only six weeks later (on 12 February 2001) to notify the plaintiff that its application could not be processed because of incomplete documentation and by again requesting for the same Fire Prevention Certificate and copies of the nursing aides' identity cards which had been supplied earlier by the plaintiff; and (iii) deciding to approve and to issue the licence G

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A some ten months later, after the plaintiff had complied with the request in the 1st defendant's letter of 12 February 2001. (paras 23 & 24)

(4a) In any case, the fact that the 1st defendant had requested
B for the same documents again by the letter of 12 February 2001 when it is clear that the plaintiff had already submitted them earlier and that he only decided to approve it some ten months later indicate clearly that the 1st defendant had abdicated his responsibility to properly process the plaintiff's
C application. (para 24)

(5) Since the plaintiff would not be able to continue to operate the hospital on a legitimate basis unless it was licenced to do so, the plaintiff must be presumed to have suffered some loss and damages in failing to obtain the licence on time.
D This third element is to be distinguished from the quantum of damages which the plaintiff is required to prove before the sum can be awarded. (para 25)

[Defendants liable in negligence; quantum of damages to be assessed by
E *the Senior Assistant Registrar]*

Case(s) referred to:
Anns and Others v. London Borough of Merton [1997] 2 All ER 492 ***(refd)***
Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***
F *Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568* ***(refd)***

Legislation referred to:
Private Hospitals Regulations 1973, reg. 3(4)

G *For the plaintiff - M Manoharan; M/s M Manoharan & Co*
For the defendants - Puan Narkunavathy; FC

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment

I **[1]** The plaintiff's claim against the defendants is for loss and damages incurred by the plaintiff by the failure of the 1st defendant to issue a private hospital licence for the following period initially:

i) 30 September 1997 to 29 September 1998;

ii) 30 September 1998 to 29 September 1999;

iii) 30 September 1999 to 29 September 2000;

iv) 30 September 2000 to 29 September 2001;

v) 30 September 2001 to 29 September 2002.

[2] The plaintiff restricts its claim for the period 30 September 2000 to 29 September 2001.

[3] The parties are agreed that since the facts are not disputed, the trial should proceed merely by submissions based on an agreed statement of facts as follows:

1. The Plaintiff, a private hospital.

1.1 The Plaintiff had applied for renewal of licences under section 3 of the Private Hospital Act 1971 as follows:

a) On 25.2.1998 – application for the 1st licence for the year 30.9.1997-29.9.1998;

b) On 12.9.1998 – application for the 2nd licence for the year 30.9.1998-29.9.1999;

c) On 13.10.1999 – application for the 3rd licence for the year 30.9.1999-29.9.2000;

d) On 1.9.2000 – application for the 4th licence for the year 30.9.2000-29.9.2001;

e) On 22.2.2001 – application for the 5th licence for the year 30.9.2001-29.9.2002.

1.2 There was non-issuance by the 1st Defendant for the 1st and 2nd licences from 1997-1999.

1.3 The 1st Defendant issued the licences as follows:

a) the 3rd licence for year 30.9.1999-29.9.2000 on 18.2.2000;

b) the 4th licence for year 30.9.2000-29.9.2001 on 11.5.2001 but was only given to the Plaintiff on 6.12.2001;

c) the 5th licence for year 30.9.2001-29.9.2002 on 11.5.2001.

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1.4 The Plaintiff did not obtain a licence from the 1st Defendant from 30.9.1997 to 18.2.2000 and from 30.9.2000 to 6.12.2001.

3. Both parties have agreed that this case proceeds by way of submission on points of law based on the agreed facts and documents.

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The Plaintiff's Submission

[4] The plaintiff applied for renewal for the period 30 September 2000 to 29 September 2001 in compliance with reg. 3(4) of the Private Hospitals Regulations 1973 which read as follows:

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> Subject to section 6 of the Act, a licence issued or renewed under these Regulations shall be valid for a period of one year from the date of issue or renewal, as the case may be, and an application for the renewal of a licence shall be made within one month before the date of expiry.

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[5] The plaintiff made the application on 1 September 2000 (admitted) in the requisite Form A and the requisite fee later.

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[6] On 8 December 2000 the 1st defendant conducted an inspection of the plaintiff's premises (the hospital).

[7] On 14 December 2000 an officer of the 1st defendant – Pegawai Kesihatan Daerah Gombak made a certification on the Form A at p. 7 under the column "Untuk Kegunaan Pejabat Sahaja" as follows: "Saya telah memeriksa premis di atas dan didapati layak untuk digunakan sebagai Hospital Persendirian."

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[8] On 14 December 2000 the Gombak District Health Office forwarded the plaintiff's documents stating that they have no objection to the application for renewal to the State Health Department.

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[9] On 26 December 2000 the 1st defendant's State Office, Jabatan Kesihatan Negeri Selangor issued a request to the plaintiff by a c.c. copy letter to the plaintiff to furnish a valid fire prevention certificate and copies of nursing aides' identity cards.

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[10] On 25 January 2001 the plaintiff furnished the following documents as requested to the Gombak District Health Office:

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i) Fire Prevention Certificate for the year 2001;

ii) copies of the identification cards of all the nursing aides; and

iii) X-ray Radar Certificate.

[11] On 12 February 2001 the 1st defendant notified the plaintiff that the application could not be processed because the documents were incomplete and requested the plaintiff to forward the following documents as soon as possible together with the payment which the plaintiff did on 22 February 2001:

1. copies of the Nursing Aides' identity cards (which had been supplied);

2. a valid Fire Prevention Certificate (also supplied).

[12] Ultimately by a letter dated 6 December 2001 the 1st defendant approved the renewal of the licence for the period 30 September 2000 to 29 September 2001.

[13] The plaintiff claims that between the period 30 September 2000 and 29 September 2001 it was unable to operate the hospital by reason that the 1st defendant had failed to renew the licence despite the plaintiff having fulfilled all the requirements.

[14] The Defence Submission

1. The Director General has full power to issue the licence in respect of Private Hospitals. In this case the application forwarded by the plaintiff was incomplete in that:

   i) it failed to furnish the fire prevention certificate and copies of the nursing aides' identity cards as at 26 December 2000;

   ii) it failed to furnish fire prevention certificate, copies of the nursing aides' identity cards and X-ray machines certificate as at 12 February 2001.

   It was only on 22 February 2001 that the plaintiff was able to furnish the documents and made the payment and thereafter the application for licence was processed and a licence dated 11 May 2001 was issued for the period 30 September 2000 to 29 September 2001.

2. In any case the defendants submit the plaintiff did not suffer any damages as it continued to operate as a maternity home and deliver babies. See Bundle B admitted Tab 33 statistics compiled by Bandaraya showing that it delivered babies during this period.

3. The Director General (1st defendant) had discharged his duties in issuing the licence responsibly and was not negligent in failing to do so for the period 30 September 2000 to 29 September 2001. He could only issue the licence if all the documents were made available to him. The certification by the District Health Officer Dr. Ruhaini Dato' Haji Ismail is only in respect of the premises but not as to its amenities or its personnel. The certification need not necessary lead to the issuance of the licence.

Findings

[15] To sustain an action in negligence the plaintiff must prove:

(i) a duty of care was owed to it by the defendants;

(ii) that there was a breach of duty of care; and

(iii) that in consequence thereof it suffered damages.

[16] See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585.

[17] The duty of care in this case is with respect to the duty of the 1st defendant to process the plaintiff's renewal of its private hospital licence. The 1st defendant would be failing in its duty of care if it fails to process that application in due course without delay barring any unpreventable impediment that it may encounter.

[18] See *Caparo Industries plc v. Dickman & others* [1990] 1 All ER 568 as approved and applied in the *Arab-Malaysian Finance Bhd (supra)*:

> the 3 criteria for imposition of duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship between the parties the court guided by situation in which the existence, scope and limit of a duty of care had previously been held to exist rather than by a single general

principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that the duty of care existed.

[19] See *Anns and Others v. London Borough of Merton* [1997] 2 All ER 492 where it was held that a statutory body conferred with the power to supervise may owe a duty of care at common law.

Whether There Was A Duty Of Care

[20] The plaintiff is an operator of an ongoing licensed private hospital which required its licence to be renewed on a yearly basis. If the licence is not renewed by the 1st defendant promptly the plaintiff could not be in a position to operate its hospital legitimately. A duty of care at common law therefore exists on the part of the 1st defendant to ensure that that licence was issued to the plaintiff in due time.

Whether There Was A Breach Of Duty Of Care On The Part Of The 1st Defendant

[21] The plaintiff's licence was due to expire on 29 September 2000 and it made the application to renew on 1 September 2000 by submitting the requisite Form A. It is clear from Form A at p. 7 under the column "Untuk Kegunaan Pejabat Sahaja" that the Pegawai Kesihatan Daerah Gombak had certified that he had inspected the plaintiff's premises and had found it fit for use as a private hospital on 14 December 2000. On the same day the Gombak District Health Office forwarded the application to the State Health Department.

[22] The certification by the Pegawai Kesihatan Daerah Gombak that the plaintiff's premises was fit for use as a private hospital notwithstanding, it was still open to the 1st defendant to request the plaintiff to furnish any such information or to comply with any further condition deemed necessary for the operation of the hospital provided that the request was made *bona fide* and without delay, bearing in mind always that there is urgency for the plaintiff to obtain the licence in order to continue to operate the hospital legitimately.

[23] Having heard the evidence and considered the submission of the parties, it is clear to me that the 1st defendant had not acted with reasonable promptitude having only approved the licence more than a year later from the date of application after the expiry of the licence being applied for. Specifically, I find the 1st defendant negligent in processing the plaintiff's licence by:

a) requesting the plaintiff to furnish the fire prevention certificate and copies of the nursing aides' identity cards only on 26 December 2000 when he could and should have acted sooner;

b) acting only six weeks later (on 12 February 2001) to notify the plaintiff that its application could not be processed because of incomplete documentation and by again requesting for the same Fire Prevention Certificate and copies of the Nursing Aides' Identity Cards which had been supplied earlier by the plaintiff to the 1st defendant through the Pejabat Kesihatan Daerah Gombak;

c) deciding to approve and to issue the licence some ten months later, after the plaintiff complied with the request in the 1st defendant's letter of 12 February 2001.

[24] Having received the plaintiff's application Form A, the 1st defendant should have been in a position to make a general assessment of what he required to enable him to process the application and should he require any further information or documents from the plaintiff this ought to be communicated to the plaintiff without delay bearing in mind the urgency of the matter. The fact that the 1st defendant had requested for the same documents again by the letter dated 12 February 2001 when it is clear that the plaintiff had already submitted them earlier and that he only decided to approve it some 10 months later indicate clearly that the 1st defendant had abdicated his responsibility to properly process the plaintiff's application.

Did The Plaintiff Suffer Damages

[25] It is indisputable that the plaintiff would not be able to continue to operate the hospital on a legitimate basis unless it was licensed to do so. That it must have suffered some loss and damages in failing to obtain the licence on time must be presumed under the circumstances. This third element is to be distinguished from the quantum of damages which the plaintiff is required to prove before the sum can be awarded.

Decision

[26] For the foregoing reasons I find the 1st defendant liable in negligence in failing in its duty of care to act with reasonable promptitude to process the plaintiff's application for the licence for the period 30 September 2000 to 29 September 2001. The 2nd defendant being the employer of the 1st defendant is vicariously liable for the act of the 1st defendant.

[27] As agreed, quantum will be assessed by the Senior Assistant Registrar. For guidance in assessing damages the Senior Assistant Registrar should base his assessment on the profit and loss account of previous years as submitted to the Suruhanjaya Syarikat Malaysia.

[28] The plaintiff is entitled to the costs of this suit.